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IN THE DISTRICT COURT OF THE UNITED STATES FOR THE CENTRAL DIVISION OF THE WESTERN DISTRICT OF MISSOURI

No. 5040

A proceeding in contempt incidental to Equity Cases Nos. 270 to 426, inclusive,

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UNITED STATES OF AMERICA,
Plaintiff (Appellee),

vs.

THOMAS J. PENDERGAST, ROBERT EMMETT O'MALLEY AND A. L. McCORMACK,
Defendants (Appellants).

Before HON. KIMBROUGH STONE, *Circuit Judge*;
HON. ALBERT L. REEVES and HON. MERRILL E. OTIS,
District Judges.

JURISDICTIONAL STATEMENT OF APPELLANT THOMAS J. PENDERGAST.[1]

Pursuant to Rule Twelve (12), Paragraph One (1), of the Supreme Court of the United States, effective February 27, 1939, appellant files this, his statement showing the

[1] Clerk's note. The Jurisdictional Statement of Appellant Robert Emmett O'Malley is identical with this and is not printed.

basis on which it is contended the Supreme Court of the United States has appellate jurisdiction to review the judgment appealed from herein, which, omitting caption and signature, is as follows:

"Judgment.

This proceeding in contempt coming on to be heard upon (a) the information filed by the United States Attorney at the direction of this court sitting in cases Nos. 270 to 426, inclusive, (b) the rule to show cause, and (c) the answers of the defendants thereto; and the court having (a) judicially noticed the proceedings, files and records in cases Nos. 270 to 426, inclusive, for the limited purpose of ascertaining in this incidental proceeding the character of those cases and their status and condition on and prior to February 1, 1936, and (b) having heard the evidence offered by the parties in this incidental contempt proceeding and the argument of counsel, and (c) being fully advised in the premises, and (d) having filed herein its opinion, including its Findings of Fact and its conclusion touching the guilt of defendants, Now, Therefore,

It Is Ordered, Adjudged and Decreed that—

1. The defendants, Thomas J. Pendergast, Robert Emmett O'Malley and A. L. McCormack, are guilty of contempt of this court; and that

2. The defendant, Thomas J. Pendergast, be and he is hereby sentenced to the custody of the Attorney General of the United States for imprisonment in an institution of the penitentiary type for a period of two years; the defendant, Robert Emmett O'Malley, be and he is hereby sentenced to the custody of the Attorney General of the United States for imprisonment in an institution of the penitentiary type for a period of two years; the defendant, A. L. McCormack, be and he is hereby sentenced to be on probation for a period of two years; and that

3. To conform with the fact, the clerk of this court shall add to the words and figures "No. 5040," wherever they appear after the style of this incidental proceeding, the words, "a proceeding in contempt incidental to Equity Cases Nos. 270 to 426, inclusive;" and that

4. The costs of this incidental proceeding are assessed against the defendants Thomas J. Pendergast and Robert Emmett O'Malley."

1. The statutes believed to sustain the jurisdiction of the Supreme Court of the United States are the Act of Congress of June 18, 1910, C. 309, Sec. 17, 36 Stat. 557; March 3, 1911, C. 231, Sec. 266, 36 Stat. 1162; March 4, 1913, C. 160, 37 Stat. 1013; February 13, 1925, C. 229, Sec. 1, 43 Stat. 936-938 (28 U. S. C. A., Sec. 380); and the Act of March 3, 1911, C. 231, Sec. 238, 36 Stat. 1157; January 28, 1915, C. 22, Sec. 2, 38 Stat. 804; February 13, 1925, C. 229, Sec. 1, 43 Stat. 938 (Judicial Code Sec. 238, 28 U. S. C. A., Sec. 345).

2. The statutes of the State of Missouri, the validity of which was allegedly involved in the causes entitled *American Fire Insurance Company* v. *Thompson,* and companion cases, numbered 270 to 426 inclusive, in equity, in the District Court of the United States for the Central Division of the Western District of Missouri, are Sections 6270, R. S. Mo. 1919, 6274, R. S. Mo. 1919, 6283, R. S. Mo. 1919, 6287 R. S. Mo. 1919, and 6311, R. S. Mo 1919, which are as follows:

"SEC. 6270.—Every fire insurance company or other insurer authorized to effect insurance against the risk of loss by fire, lightning, hail or windstorm shall maintain a public rating record from which the rate of premium applicable to each risk in this state to be written by such company or other insurer may be ascertained in advance of the making of insurance thereon. Such

rating record shall include, in so far as applicable, general basis schedule embodying basis rates, charges, terms, conditions, permits and standards, and such other data necessary to the computation or promulgation of equitable rates and rules of practice. Such records shall also show the forms and indorsements upon which each rate is predicated, and shall further show the changes of rate to be made on account of each and every change of form or indorsement. Such rating records shall be open to the inspection of the entire public and shall be maintained in such a form that the property owner can readily ascertain the rate charged on any class of property and the make-up of such rate. Every fire insurance company or other insurer authorized to effect insurance against the risk of loss by fire, lightning, hail or windstorm shall upon the issuance of a policy furnish to the holder thereof a written or printed analysis of the rate or premium charged for such policy, showing the items of charge and credit which determine the rate.

"SEC. 6274.—All public rating records required to be maintained by this article, whether kept by insurers separately or actuarial bureaus, shall show the rate which such insurer proposes to charge and collect, but any insurer maintaining its own public rating record, or any actuarial bureau shall be permitted to change or lower its rate or rates whenever it sees fit: Provided, that rates shall not be raised until at least ten days' notice has been given by the insurance company to the superintendent of insurance and his approval obtained, but in making a change it shall be required to make the change in writing on its public record, and to immediately give notice thereof to the superintendent of insurance. Changes of rate on account of physical hazard of any property, or on account of changes and improvements therein shall be immediately made when the facts warrant, and such change of rate shall become operative immediately when made. New or unrated risks may be written temporarily for a period of not exceeding sixty (60) days, within which period such

risks shall be rated as provided herein, and policies of insurance covering such risks shall carry the rate so made from the beginning of the term of insurance. Copies of all public rating records, whether kept by companies separately or actuarial bureaus, shall be filed with the superintendent of insurance not later than ninety days after the taking effect of this article, and notice of all changes made therein shall be immediately filed with the superintendent of insurance, and such public records and changes therein and modifications thereof shall be open to free public inspection and examination at all reasonable hours of each business day.

"SEC. 6283.—The superintendent of insurance, upon written complaint of any citizen, or upon his own motion, is hereby empowered to investigate the necessity for a reduction of rates, and if, upon such investigation, it appears that the result of the earnings in this state of the stock fire insurance companies for five years next preceding such investigation shows there has been an aggregate profit therein in excess of what is reasonable, he shall order such reduction of rates as shall be necessary to limit the aggregate collections by insurance companies in this state to not more than a reasonable profit. Any reduction ordered by the superintendent of insurance shall be applied, subject to his approval: Provided, that the superintendent of insurance shall designate the class or classes to which the reduction shall be applied if the companies do not, within thirty days from the order of reduction, submit a class or classes which meet his approval. In determining the question of rates and profits in accordance with this article, the superintendent of insurance shall give proper and reasonable consideration to the conflagration liability, both within and without the state.

"SEC. 6287.—The superintendent of insurance, if he shall find that any insurance company or any officer, agent or representative thereof, has violated any provision of this article, may in his discretion revoke the license of such offending company, officer or agent, but

the revocation of the said license shall in no manner affect the liability of such company, officer, agent or representative to the infliction of any other penalty provided by the laws of this state. Any fire insurance company or any director or officer thereof, or any agent or person acting for or employed by such company who, alone or with any other corporation, company or person, shall willfully do or cause to be done or shall willfully suffer or permit to be done any act, matter or thing in this article prohibited or declared to be unlawful, or who shall willfully suffer or permit any act, matter or thing in this article required to be done, or shall cause or willfully suffer or permit any act, matter or thing so directed by this article to be done, not to be done, or shall be guilty of any infraction of this article, shall be deemed guilty of a misdemeanor and shall upon conviction thereof be punished by a fine not to exceed five hundred dollars for each offense: Provided, that if the offense for which any person shall be convicted as aforesaid shall be an unlawful discrimination, such person shall be punished by a fine of not to exceed five hundred dollars or by imprisonment in the county jail for a term not exceeding ninety days or by both such fine and imprisonment.

"SEC. 6311.—If any foreign or non-resident insurance company, corporation, association or concern of any kind, including fraternal or beneficial associations or corporations and surety companies or corporations, organized and incorporated under the laws of any other state, territory or country, and doing business in this state under the laws of this state regulating and authorizing the licensing of any such company, corporation, association or concern by the superintendent of the insurance department of this state, shall, without the written consent, given and obtained after the filing of such suit or proceeding in the state court, of the other party to any suit or proceeding brought by or against it in any court of this state, whether suit or proceeding be pending in the state at the time of, or be brought after the taking effect of this section, re-

move said suit or proceeding to any federal court, or shall institute any suit or proceeding against any citizen of this state in any federal court, it shall be the duty of the superintendent of the insurance department to forthwith revoke all authority to such company, corporation, association or concern, and its agents, to do business in this state, and such company, corporation, association or concern shall not again be authorized or permitted to do business in this state at any time within five years from the date of such revocation. And the superintendent shall publish such revocation in at least six newspapers of large and general circulation in the state: Provided, however, that the revocation of such authority shall not in any manner affect the duties and liabilities of any such company, corporation, association or concern under any policy or contract of insurance issued by it prior to and in force at the time of the revocation of such authority."

3. The judgment appealed from was entered on June 7, 941, and the application for appeal is presented on July -, 1941. The judgment appealed from was one of convic- on for criminal contempt, rendered by a purported statu- ry three-judge court consisting of Hon. Kimbrough Stone, ircuit Judge, Hon. Albert L. Reeves, District Judge, and Ion. Merrill E. Otis, District Judge. This court purported o have been convened (under the authority of Section 266 f the Judicial Code, 28 U. S. C. A., Sec. 380) upon the pplication of the plaintiffs, in the causes in equity above entioned, to hear and determine their request for an inter- cutory injunction enjoining official interference with cer- in insurance rates theretofore promulgated. The statu- ry court assumed jurisdiction and granted an interlocu- ry injunction. Upon information filed in the name of the nited States, by the acting United States District Attor- ey upon his official oath, defendants in this proceeding, cluding this appellant, were charged with, and convicted f, alleged criminal contempt of such purported statutory

court by reason of their claimed connection with an allegedly fraudulent settlement of such rate litigation. Sentences imposed were punitive and not remedial, this appellant being sentenced to a term of two years in the penitentiary.

4. The bills in the equity causes above mentioned (hereinafter referred to as the "Insurance rate litigation") were filed on May 25, 1930 by a large number of fire insurance companies seeking injunctive relief from interference with certain rate schedules. Those bills, as digested briefly in the information herein filed, alleged, among other things: That the Missouri Superintendent of Insurance had failed to approve the rates being charged by the companies for fire and windstorm insurance, in accordance with a notice filed with such Superintendent on December 30, 1929, and that, although the Superintendent of Insurance refused to enter any order approving such rates, he asserted a lack of power in the companies to collect the rates without his approval; that this attitude on the part of the Insurance Superintendent tended to lessen and destroy the value of the established business of the plaintiff companies in the State of Missouri; that under the authority of certain designated statutes of Missouri (hereinbefore specified) the Superintendent of Insurance would take action against the companies which would operate to deprive them of liberty and property without due process of law and deny them the equal protection of the laws in derogation of Section 1 of the Fourteenth Amendment to the Constitution of the United States; that the companies had no plain, adequate or complete remedy at law; and that the Missouri Superintendent of Insurance, and the Missouri Attorney General, should be enjoined from invoking the powers conferred by the statutory provisions aforesaid, and enjoined from any interference of any kind with the collection and retention by the companies of premiums in accordance with the

increased rate schedules, and restrained from refusing to renew the licenses of such companies. On July 2, 1930, Hon. Kimbrough Stone, Circuit Judge, Hon. Albert L. Reeves, District Judge, and Hon. Merrill E. Otis, District Judge, purporting to constitute and sit as the District Court for the division and district aforesaid, granted an interlocutory injunction as prayed in each of said causes. A further order was entered, however, appointing a custodian to receive sixteen and two-thirds per cent of all premium charges collected by the companies (constituting the promulgated rate increase), which percentage was to be impounded pending the final decisions in the several causes upon their merits. Subsequently answers were duly filed by the defendants in such causes. Such answers prayed that the interlocutory injunction be vacated, alleged that the companies in whole or in part had failed to comply with prior judicial orders of the same United States Court in certain other independent litigation (under the "clean hands" doctrine), charged that the companies were precluded from assailing the Missouri statutes involved after claiming benefits thereunder in the promulgation of the rate increase in question, negatived the alleged unconstitutionality of the Missouri statutes in issue, urged that the companies should be relegated to their legal remedies under the Missouri statutes as a condition precedent to any other form of relief, and raised divers other special and general defenses. Thereafter an order of reference to a special master was entered, testimony was taken before him, and a report as to certain of the companies and causes was by him filed. On May 18, 1935, R. E. O'Malley, Superintendent of Insurance of Missouri, and Charles R. Street, representative of the plaintiff companies aforesaid, entered into an agreement of settlement in disposition of the foregoing litigation. On June 19, 1935, the plaintiff companies filed a motion for decree on the basis of a stipulation, filed there-

with, conforming to the terms of such settlement. On February 1, 1936, a decree was entered as prayed, directing the distribution of the impounded funds, dismissing the bills, and retaining jurisdiction for the purpose of effecting the decree.

On May 29, 1939, the litigation aforesaid was sought to be reopened by a motion filed by a successor Superintendent of Insurance charging that the settlement thereof was corrupt. On May 20, 1940, the purported three-judge court requested the acting United States District Attorney to prepare and prosecute an information charging the defendants in this proceeding, including this appellant, with contempt. At the same time the court urged him to submit the matter to the grand jury for action upon the ground that obstruction of the administration of justice constituted an indictable criminal offense. The acting United States District Attorney agreed so to do. Subsequently, after being charged by Hon. Merrill E. Otis, District Judge, the grand jury on July 13, 1940, returned indictments charging obstruction of justice against the defendants in this proceeding. The acting United States District Attorney, upon his official oath, also on July 13, 1940 filed an information against the defendants in this proceeding, charging them with criminal contempt.

5. The indictments in question (material by reason of the issue of double jeopardy) charged the defendants in this proceeding with the same acts charged against them in the information, hereinafter briefly summarized, construing such alleged acts to constitute both a conspiracy to obstruct the administration of justice and a conspiracy to defraud the United States by obstruction of the administration of justice. The indictments were consolidated for trial, and on November 18, 1940, a jury was duly selected and sworn. On November 19, 1940, a *nolle prosequi* was entered by the

United States District Attorney, upon the ground that in May, 1939, this appellant, and a co-defendant, had entered pleas of guilty to certain indictments for income tax evasion under an agreement with the United States that there would be no prosecution for any other offense growing out of the same transactions.

6. The information filed in this proceeding, after reference to the insurance rate litigation aforesaid, charged in substance: That the stipulation of settlement, hereinbefore mentioned, involving the distribution of the impounded funds in the rate litigation, was fraudulent and corrupt, and that the decree of February 1, 1936 was fraudulently and corruptly procured; that the defendant McCormack and the defendant O'Malley early in the year 1935 arranged a conference between a certain Charles R. Street, agent for the insurance companies in the rate litigation, and defendant Pendergast, for the purpose of discussing a possible settlement of such litigation; that in the conference so arranged the said Street advised defendant Pendergast of his willingness to pay a fee to bring about a settlement of such litigation, and that a fee of $500,000.00 was then agreed upon; that shortly thereafter, through defendant McCormack, Street delivered $50,000.00 to defendant Pendergast in Kansas City, Missouri; that thereafter, also through defendant McCormack, the said Street delivered a further sum of $50,000.00 to defendant Pendergast, the latter retaining only $5,000.00 and returning to defendant McCormack the sum of $45,000.00 which the latter divided between himself and defendant O'Malley; that thereafter, Street and defendant O'Malley entered into the agreement of settlement of May 18, 1935; that in the early part of the year 1936, defendant McCormack received from Street the sum of $330,000.00, which he delivered to defendant Pendergast, who retained $250,000.00 and returned to de-

fendant McCormack the balance of $80,000.00, which the latter divided between himself and defendant O'Malley; that in October, 1936, Street forwarded to defendant McCormack the further sum of $10,000.00, which the latter delivered to defendant Pendergast; that the payments mentioned were for the purpose of purchasing the political influence of defendant Pendergast, bribing and corrupting defendant O'Malley to induce the latter as Superintendent of Insurance to agree to the settlement aforesaid, and to recompense defendant McCormack for his activities as intermediary, "and for the purpose of obtaining from the United States District Court a decree by the fraudulent means aforesaid, and to induce each and all of them to conceal from the United States District Court the fraudulent and corrupt transactions which have hereinbefore been set forth"; that the defendants agreed to keep the transactions aforesaid secret and concealed from the court, and by affirmative acts of concealment and silence prevent the court from obtaining knowledge or information of such transactions; that such concealment was effective and the transactions aforesaid were only disclosed when defendant McCormack, before a grand jury investigating alleged income tax evasion of defendant Pendergast, after a period of concealment, and after defendant O'Malley requested him to continue such concealment, finally made full disclosure of all of such transactions. The prayer of the information was that the defendants should be held in contempt, punished by fine and imprisonment, ordered held in the custody of the United States Marshal or in such penal institution as might be designated, and for such further remedial or punitive orders as the court should deem proper.

This appellant filed a motion to quash the information upon the following grounds: (a) That a statutory three-judge court is without jurisdiction, power or authority to entertain, hear or determine an independent action at

law for criminal contempt initiated by the United States upon information of the United States District Attorney; (b) that the acts charged against defendant Pendergast did not constitute misbehavior in the presence of the court or so near thereto as to obstruct the administration of justice; (c) that prosecution under the information was barred by the statute of limitations; and (d) that prosecution under the information would subject defendant Pendergast to double jeopardy by reason of the prosecution under the indictments hereinbefore specified. This motion was overruled in an opinion appended hereto as Exhibit A.

Pursuant to leave granted to incorporate all defenses, general or special, in bar or otherwise, in a single answer, this appellant thereupon filed his special plea and answer, setting up: (a) double jeopardy in violation of the Fifth Amendment to the Constitution of the United States; (b) the bar of the Statute of Limitations; (c) the lack of jurisdiction of the court to entertain an independent action at law by the United States prosecuting for criminal contempt; (d) the lack of jurisdiction of the court in the original insurance rate litigation, and throughout the pendency thereof, with the averment that the court was not and has not been constituted as a judicial body or authorized to exercise judicial jurisdiction, functions or authority; (e) a plea of not guilty; (f) the agreement of the United States not to prosecute for the offense charged, with the averment that prosecution under the information by reason of the agreement, should be abated or held in abeyance to permit an application for executive clemency; (g) prejudgment by the court of the issues of law and fact arising under the information.

7. Appellant, being aggrieved by the judgment and sentence herein, and desiring to appeal, and being in doubt as to whether the appeal should properly be taken to the

Supreme Court of the United States or the Circuit Court of Appeals for the Eighth Circuit, the question of jurisdiction not having been obviously settled by prior decisions, prayed for and was allowed an appeal to the said Circuit Court of Appeals, and now prays for allowance of this appeal to the Supreme Court of the United States. The bases for the jurisdiction of the Supreme Court of the United States upon direct appeal are the following:

(a) If the three-judge court aforesaid was duly convened in the insurance rate litigation, and such litigation came within the proper purview of Section 266 of the Judicial Code (28 U. S. C. A., Sec. 380), and if it was proper and necessary that such court should sit in this cause, then a direct appeal lies to the Supreme Court of the United States.

Rorick v. *Board of Commissioners of Everglades Drainage District, et al.*, 307 U. S. 208, 213; 83 L. Ed. 1242, 1245.

Moore v. *Fidelity & Deposit Co.*, 272 U. S. 317, 321; 71 L. Ed. 273, 278.

Smith, et al. v. *Wilson, et al.*, 273 U. S. 388, 391; 71 L. Ed. 699, 700.

Oklahoma Gas & Electric Co. v. *Oklahoma Packing Co.*, 292 U. S. 386, 392; 78 L. Ed. 1318, 1322.

(b) If, as contended by the United States and held by the three-judge court, this cause (although appellant contends that it is an independent criminal action at law for criminal contempt initiated by the United States against this appellant) is nevertheless incidental and ancillary to the insurance rate litigation, causes in equity, and if an appeal from any final decree in said causes would lie to the Supreme Court of the United States, then in this cause

a direct appeal lies to the Supreme Court of the United States.

Arkadelphia Milling Co. v. *St. Louis Railway Co. et al.*, 249 U. S. 134, 142; 63 L. Ed. 517, 523.

Leman v. *Krentler-Arnold Hinge Last Co.*, 284 U. S. 448, 457; 76 L. Ed. 389, 397.

United States v. *California Cooperative Canneries*, 279 U. S. 553, 560; 73 L. Ed. 838, 843.

(c) If it be determined that the judgment of conviction for criminal contempt is a supplemental decree or order in aid of or incident to any decree or order in the insurance rate litigation appealable directly to the Supreme Court of the United States, then a direct appeal from such judgment of conviction lies to the Supreme Court of the United States.

Arkadelphia Milling Co. v. *St. Louis S. W. Ry. Co., et al.*, 249 U. S. 134, 142; 63 L. Ed. 517, 523.

Terminal Railroad Ass'n of St. Louis v. *United States*, 266 U. S. 17, 32; 69 L. Ed. 150, 156.

St. Louis etc., Railway v. *Hasty, et al.*, 255 U. S. 252, 256; 65 L. Ed. 614, 617.

(d) Whether or not the Supreme Court of the United States has jurisdiction to determine the merits, it has jurisdiction to determine, and should determine, in order to enforce the limitations of Section 266 of the Judicial Code (28 U. S. C. A. Sec. 380) and to conform procedure to its requirements, whether the three-judge court aforesaid was legally convened and properly assumed jurisdiction in the insurance rate litigation, whether such three-judge court was properly exercising jurisdiction therein at the time of the alleged contemptuous acts charged, and whether said three-judge court had jurisdiction to entertain this proceeding for criminal contempt instituted by the United States; and if said three-judge court acted herein with-

out authority or jurisdiction or in excess of jurisdiction, the order and judgment of conviction should be vacated.

Oklahoma Gas & Electric Co. v. *Oklahoma Packing Co.*, 292 U. S. 386, 392; 78 L. Ed. 1318, 1322.

International Ladies' Garment Workers Union, et al. v. *Donnelly Garment Co. et al.*, 304 U. S. 243, 252; 82 L. Ed. 1316, 1323.

Phillips v. *United States*, — U. S., —; 85 L. Ed. 460, 465.

Gully v. *Interstate Natural Gas Co.*, 292 U. S. 16, 19; 78 L. Ed. 1088, 1092.

7. Appellant asserts that the three-judge court erred in its orders, opinions, rulings, judgment, decision and sentence in the following particulars:

(1) The three-judge court erred in holding, deciding and finding this appellant guilty of contempt.

(2) The three-judge court erred in its judgment and in its sentence against this appellant for the reason that, if, as held by the three-judge court, this proceeding was a part of and incidental and ancillary to the causes in equity known as the insurance rate litigation, the attempt of the three-judge court to impose a punitive sentence constituted a variance and departure between the procedure followed and the punishment sought to be inflicted. See *Gompers* v. *Buck's Stove Co.*, 221 U. S. 418, l.c. 449, 55 L. Ed. 797, l.c. 809.

(3) The three-judge court erred in holding that it acquired jurisdiction under the provisions of Section 266 of the Judicial Code (28 U. S. C. A., Sec. 380) in the equitable causes known as the insurance rate litigation for the reasons (a) that the three-judge court was not lawfully convened or constituted, and (b) that the allegations and averments in the pleadings in the insurance rate litigation, and the issues

thereby created, did not justify the formation of a three-judge court under the statutory authority aforesaid or vest said purported three-judge court with jurisdiction therein, the allegations and averments in the bills in equity relative to the claimed unconstitutionality of the Missouri statutes above specified being colorable only, and the pleadings in such insurance rate litigation giving rise in truth and in fact exclusively to the issue of whether the action of the Superintendent of Insurance under such statutes was confiscatory, arbitrary, and improper. See *Phillips* v. *United States*, — U. S. —, 85 L. Ed. 460. Appellant contends, moreover, that the only remedy available to the insurance companies, in view of the foregoing, was a statutory petition for review under the terms of the Missouri statutes aforesaid.

(4) The three-judge court erred in holding that it was a lawfully constituted statutory court and that it was lawfully exercising its purported statutory jurisdiction at the time of the alleged contemptuous acts charged, for the reasons specified in the assignment next hereinbefore preceding and for the further reason that, if it acquired initial jurisdiction under the colorable allegations of the bills in equity, such jurisdiction had been lost prior to the time of said alleged contemptuous acts when it appeared that the constitutionality of the Missouri statutes in question was not in truth and in fact involved in such litigation.

(5) The three-judge court erred in holding that it was vested with jurisdiction to entertain, hear and determine this proceeding for the reasons hereinbefore stated in the assignments above appearing, and for the further reason that this proceeding is an independent action at law for criminal contempt and not a part of or incident or ancillary to the proceedings in equity known as the insurance rate litigation, and such purported statutory court has no juris-

diction over such an independent action. The attempt of the three-judge court to restyle this proceeding, at the time of judgment and sentence, as incidental and ancillary to such insurance rate litigation, is a nullity and cannot alter the character of the proceeding. See *Gompers* v. *Buck's Stove Co.*, 221 U. S. 418, l. c. 449, 55 L. Ed. 797, l. c. 809, and *Public Service Commission* v. *Brashear Freight Lines*, — U. S. —, 85 L. Ed. 717. Under the rules of court Hon. John Caskie Collet alone was or is authorized to sit as District Judge for the Central Division of the Western District of Missouri.

(6) The three-judge court erred in holding that the acts charged against this appellant constituted criminal contempt of said court.

(7) The three-judge court erred in holding that the acts charged against this appellant constituted misbehavior of this appellant in the presence of said court or so near thereto as to obstruct the administration of justice within the meaning of Section 268 of the Judicial Code (28 U. S. C. A. Sec. 385).

(8) The three-judge court erred in its findings, rulings, judgment and sentence for the reason that under controlling decisions of the Missouri Supreme Court (*American Constitution Fire Co.* v. *O'Malley*, 342 Mo. 139, 113 S. W. (2d) 795) R. E. O'Malley, Superintendent of Insurance, was without authority to settle or compromise the insurance rate litigation, his attempted action in so doing was a nullity, and the three-judge court was without jurisdiction, power or authority to entertain such settlement or any motion or stipulation based thereon, or to consider or approve or disapprove such attempted settlement and compromise.

(9) The three-judge court erred in holding that the prosecution under the information herein filed was not barred

by the statute of limitations or by the fact that the information was not filed within three years next after the alleged contemptuous acts charged; and the said court was, therefore, without authority or power to punish appellant for alleged contempt.

(10) The three-judge court erred in holding that the prosecution of this appellant under the information herein filed did not subject appellant to double jeopardy in violation of the provisions of the Fifth Amendment to the Constitution of the United States.

(11) The three-judge court erred in refusing to give effect to the agreement duly entered into between the United States and this appellant whereunder it was agreed that, if appellant entered a plea of guilty to an indictment charging income tax evasion, he would not be prosecuted for alleged contempt; by reason of such agreement the instant prosecution should either have been abated or stayed pending an application for executive clemency and appropriate action thereon by the Executive.

(12) The three-judge court erred in entertaining, hearing and determining this proceeding for the reason that said court, and the several members thereof, were disqualified by reason of having prejudged the issues of law and of fact herein involved and the guilt of this appellant. This proceeding, therefore, deprived appellant of liberty without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

(13) The three-judge court erred in failing and refusing to follow the last pronouncement of the Supreme Court of the United States on the law applicable to the facts in this proceeding, such pronouncement appearing in *Nye and Mayers* v. *United States*, — U. S. —, 61 Sup. Ct. Rep. 810, 85 L. Ed. 733, 734, and in failing and refusing to follow the controlling decision in the Eighth Circuit of *Morgan* v.

United States, 95 F. (2d) 830, with which decision the finding, judgment and sentence in the instant proceeding is in conflict.

(14) The three-judge court erred in that its action in predicating its judgment of conviction and the sentence of appellant upon the ground that "defendants stood on their technicalities," and that appellant failed to testify in his own behalf, denied appellant due process of law in violation of the Fifth Amendment to the Constitution of the United States, and further violated the provisions of said amendment which, in part, declares: "No person shall be * * * compelled in any criminal case to be a witness against himself * * *."

(15) The three-judge court erred in predicating its judgment of conviction and the sentence of appellant upon the ground that "defendants stood on their technicalities," and in holding that appellant should have by full disclosure incriminated himself before the statute of limitations could begin to run in his favor as a bar to the prosecution of the alleged offense of criminal contempt.

(16) The three-judge court erred in holding that this appellant, to benefit by the bar of the statute of limitations, was compelled to make full disclosure of the alleged offense charged for the reason that said ruling is in violation and contravention of the Fifth Amendment to the Constitution of the United States providing that no person shall be compelled in any criminal case to be a witness against himself.

(17) The three-judge court erred in taking judicial notice of proceedings in the insurance rate litigation which were not introduced in evidence in the instant proceeding or otherwise incorporated in the record herein, and in basing its judgment of conviction and sentence thereon, for the reason that this is an independent action at law prosecuted by the United States, seeking the conviction of appellant

for the offense of criminal contempt, and is neither part of nor incident nor ancillary to the equitable proceedings known as the insurance rate litigation. The three-judge court, sitting as triers of the facts, was not authorized to consider any matter, fact or thing occurring in or during the said insurance rate litigation which does not appear in the evidence and record of the instant proceeding. This appellant was not a party to the insurance rate litigation or directly or indirectly connected therewith.

(18) The three-judge court erred for the reason that it could have acquired no jurisdiction in the insurance rate litigation other than to grant or deny injunctive relief sought on the ground of the unconstitutionality of specified State statutes; and in purporting to entertain, hear, consider, approve and enforce the purported settlement of said insurance rate litigation, in whole or in part, said court was acting extra-jurisdictionally and its action was a nullity and void.

(19) The three-judge court erred in its findings, judgment and sentence for the reason that the alleged contemptuous acts sought to be charged against appellant could not and did not constitute contempt of said court, which said court had power, jurisdiction or authority to punish by summary process or by any procedure other than indictment.

Appellant appends hereto copies of all opinions in this proceeding.

Respectfully submitted,

R. R. Brewster,
John G. Madden,
James E. Burke,
Attorneys for Thomas J. Pendergast.

Filed in the United States District Court, July 2, 1941.

APPENDIX.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI

No. 5040.

UNITED STATES OF AMERICA, *Plaintiff*,

vs.

THOMAS J. PENDERGAST, ROBERT EMMETT O'MALLEY and A. L. McCORMACK, *Defendants*.

A Proceeding in Contempt Incidental to Equity Cases Nos. 270 to 426, inclusive.

On Motions to Abate and Quash Information in Contempt.

Before Stone, Circuit Judge, and Reeves and Otis, District Judges.

Otis, District Judge, delivered the opinion of the Court.

An information charging Thomas J. Pendergast, Robert Emmett O'Malley and A. L. McCormack with contempt of this statutory court was filed by the United States Attorney July 13, 1940. A full synopsis of the information is set out in the margin.[2] It is alleged in the information that the

[2] The information sets out that there were filed in the Central Division of the Western District of Missouri on May 25, 1930, cases in equity numbered 270 to 426, seeking injunctions forbidding the superintendent of insurance interferring with certain rates filed by insurance companies. That on July 2, 1930, temporary injunctions were issued. That a custodian was appointed to receive a certain excess of premiums, pending final decision of the cases. That a master was appointed to take and that he proceeded to take testimony. The information sets out that on June 18, 1935, motions for decrees were filed, setting up that settlements had been arrived at in accordance with a stipulation also filed. That on February 1, 1936, the court entered its decree in accordance with the stipulation, distributing approximately $8,000,000 in impounded funds as agreed to by the parties.

The information then charges that the stipulation of settlement and for distribution of funds and the consequent decree were induced corruptly and in contempt of court. That O'Malley conferred with McCormack asking him to confer with one Street, acting for the insurance companies, to get Street to confer with Pendergast about a possible settlement of the insurance litigation. That accordingly Street did confer with Pendergast. That Street told Pendergast he would pay a fee to bring about a settlement. That a fee of $500,000 was agreed upon. That a first instal-

three individuals named had procured from this Court a decree in a number of cases involving insurance rates in Missouri and involving the disposition of a huge fund impounded by the court, that they had obtained the decree by the bribery of the superintendent of insurance, one of the litigants, and by representations to the court that a settlement had been honestly arrived at by the parties. It was further of the essence of the information that the named individuals not only deceived and committed a fraud on the court, but that they continued the original deception and fraud by affirmative acts designed to prevent discovery by the court of the truth concerning the settlement.

On August 31, 1940, Pendergast and O'Malley separately filed substantially identical motions to abate and quash the information. On September 3, 1940, McCormack filed a like motion. These motions have been submitted on oral arguments and written briefs and are now to be ruled.

Of the several grounds set out in the motions three only have been presented in argument. We discuss them.

Jurisdiction.

1. It is contended that this court "is a statutory tribunal of limited jurisdiction and that it is without jurisdiction in this proceeding." The reasoning of counsel is this:

This three-judge court is a three-judge court of the *Central Division* of the Western District of Missouri and is "a separate and distinct tribunal" of that division.

Steers v. *U. S.* (S. C. C. A.) 297 Fed. 116, 118. By rule of court made pursuant to statute (Title 28, Sec. 27, U. S. C.).

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ment of $50,000 was paid. That a second installment of $50,000 was paid, of which $22,500 went to McCormack and $22,500 went to O'Malley. That later $330,000 was given by Street to McCormack and by McCormack to Pendergast, Pendergast keeping $250,000 and dividing $80,000 between O'Malley and McCormack. That a final payment of $10,000 was made by Street to McCormack and by McCormack to Pendergast. That the payments were made to buy the influence of Pendergast, to corrupt O'Malley to accept the settlement, and to obtain the decree by fraudulent means.

Finally it is charged in the information that Pendergast, O'Malley and McCormack agreed that, by affirmative acts of concealment, they would prevent discovery by the court of the bribery and fraud which had been committed to obtain the decree and that one or more of the three thereupon and thereafter perpetrated such affirmative acts of concealment which are specifically described.

Judge Collet now is the federal district judge assigned to the Central Division. Judge Collet, therefore, and he alone, has jurisdiction of offenses committed against any federal district court (three-judge court or otherwise) sitting in and for the Central Division, *provided the offense is an independent proceeding and not incidental to the original litigation pending before the three-judge court.*

The reasoning is sound. The last mentioned hypothesis is error. The misbehavior charged against defendants may not constitute contempt (that is the next question to be considered) but accepting as true the allegations in the information, it was certainly misbehavior obstructing the administration of justice *in cases pending before this three-judge court.* Its punishment, if the allegations are proved and if contempt is shown, clearly is as incidental *to the cases pending* as interference with the administration of justice in any case is incidental to that case. Any contempt, not committed *in the face of the court,* must be incidental to some case. If the alleged misbehavior was not incidental to the case pending before the three-judge court, to what case was it incidental? The fact that misbehavior may be an independent crime under the laws does not mean, of course, that it may not be, *as contempt,* incidental to some principal case. *In re Savin,* 131 U. S. 267.

We resolve contention No. 1 against the movants.

Is Contempt Charged? The "Order and Decorum" Argument.

2. The information in effect charges that the insurance companies, through McCormack, furnished Pendergast with money, which Pendergast used to bribe O'Malley to deceive this court so as to obtain a decree giving money held by the court to the companies. The conspiracy to act and the acts committed (except the final act through counsel) all were beyond the *physical presence of the court.* The second contention is that no act charged against any of defendants was of such a nature as to disturb the "order and decorum" of the court and that only acts of that character (and certain other acts which the alleged misbehavior obviously is not) can constitute contempt.

The whole argument in support of this contention is rooted in a *dictum* used by the Supreme Court in *Ex Parte Robinson*, 19 Wall. 505. In that case there was a judgment against Robinson, that he had been guilty of contempt, bottomed on "the tone and manner" in which he made certain statements in open court, the statements themselves being not in substance contemptuous. The district judge sought to punish the contemnor by disbarment. The only question determined in the case was that disbarment was not such a punishment as could be imposed for contempt. In an incidental discussion of the statute (now Section 385, Title 28), the court said (the italics are ours):

"It limits the power of these courts in this respect to three classes of cases: 1st, where there has been misbehavior of a person in the presence of the courts, or so near thereto as to obstruct the administration of justice; 2d, where there has been misbehavior of any officer of the courts in his official transactions; and, 3d, where there has been disobedience or resistance by any officer, party, juror, witness, or other person, to any lawful writ, process, order, rule, decree, or command of the courts. *As thus seen the power of these courts in the punishments of contempts can only be exercised to insure order and decorum in their presence, to secure faithfulness on the part of their officers in their official transactions, and to enforce obedience to their lawful orders, judgments, and processes.*"

The phrase "to insure order and decorum in their presence" in the dictum quoted is seized upon. It is perfectly obvious, however, to one who gives any thought to the matter, that the Supreme Court did not mean to say that the only "misbehavior" referred to in the statute was such as constituted an interference "with order and Decorum." Here was intended only *an illustration* of the misbehavior which might be punished as contempt. The reference is to *order and decorum* "in their presence," but the very words of the statute make punishable as contempt misbehavior *not in the presence of the court*, provided it is "so near thereto as to obstruct the administration of justice."

If any doubt at all could arise from the language of the Supreme Court in *Ex Parte Robinson,* it certainly was entirely dissipated in the later opinion in *Toledo Newspaper Co.* v. *United States,* 247 U. S. 402. It was made perfectly clear by the opinion in that case that contempt was not restricted to interference with "order and decorum." When the opinion is read in connection with the opinion of the district court in the same case (220 Fed. 458) it is clear that *it is the effect on the administration of justice which is the test of whether misbehavior is contempt.* If the tendency of the misbehavior is to affect the administration of justice, it is contempt, whether it is in the presence of the court or at some point away from the presence of the court, whether it affects the order and decorum of the courtroom or does not affect them.

The Court of Appeals for this circuit in *Froelich* v. *United States,* 33 F. (2d) 660, by its reasoning, entirely disposed of this second contention of defendants. Froelich had written a letter to an attorney in a case in which he reflected upon the integrity of Judge Sanborn, then district judge. The effect of the letter was to induce an affidavit of prejudice. The affidavit of prejudice affected the administration of justice. The act of writing the letter was held to be punishable contempt. The Court of Appeals said—

"* * * undoubtedly one who seeks to induce an attorney in a case to file such an affidavit (i. e., an affidavit of prejudice) by laying before him false and malicious statements as to the uprightness and honor of a trial judge, if the result is the filing of an affidavit of bias and prejudice, does obstruct the administration of justice. That obstruction follows from the necessary rearrangement of judicial machinery and possible delays incident to the filing of such an affidavit."

The Statute of Limitations

3. The contempt charged was "misbehavior" in the "presence" of the court within the meaning of Section 385 of Title 28, U. S. C. The misbehavior became effective and was intended to become effective when the court was asked to hand down its decree and when that decree was continued

in force by the court. While the most expanded meaning has been given to the word "presence" as used in the statute, no expanded meaning is required here. One who, either by himself or by his agent (perhaps by an agent wholly innocent), obtains a decree by representations he makes or causes to be made in open court, in the very face of the court, of course, acts in the "presence" of the court. It is not needed that the companion words in the statute—"or so near thereto" (i. e., to the presence of the court) "as to obstruct the administration of justice," be regarded. They only emphasize the fact that "presence" is to be broadly interpreted. The misbehavior need not be in the *actual presence.* It is sufficient if it is near enough so as "to obstruct the administration of justice." It is "near enough," although it takes place 500 miles away from the courthouse, if it does "obstruct the administration of justice." A letter mailed in London, addressed to a district judge in Missouri, delivered to him in chambers, falsely charging him with misconduct concerning a pending case, certainly is "misbehavior." It is committed, because it takes effect, in the "presence" of the court. At any rate it is "so near" to the "presence" as to obstruct the administration of justice. A consideration of a few of the decided cases will illuminate the subject.

In the leading case of *In Re Savin,* supra, the Supreme Court made it clear that "in the presence of the court" did not mean the personal presence of the judges or when the court is in session. The contempt in that case was committed by an attempt to induce a witness not to testify. The inducement was in the jury room temporarily used as a witness room. The Supreme Court said that was misbehavior in the "presence of the court." "The court," said the Supreme Court, "is present in every part of the place set apart for its own use, and for the use of its officers, jurors and witnesses; and misbehavior anywhere in such place is misbehavior in the presence of the court."

The Ninth Circuit Court of Appeals, in *Independent Publishing Co.* v. *United States,* 240 Fed. 849, said that the publication of an article in a newspaper, copies of which would be seen by jurors sitting in a case in trial and containing an article attacking the character of the defendant

then on trial, was contempt committed "in the presence of the court." The Court of Appeals said, "the misbehavior is committed where it takes effect." The court quoted with approval an opinion of the Supreme Court of Georgia to the effect that—

"The well established theory of the law is that, where one puts in force an agency for the commission of crime, he, in legal contemplation, accompanies the same to the point where it becomes effectual. * * * So, if a man in the state of South Carolina criminally fires a ball into the state of Georgia, the law regards him as accompanying the ball, and as being represented by it up to the point where it strikes."

See also and particularly *Froelich* v. *United States, supra.*

The contempt charged in the information was on account of "misbehavior" in the "presence of the court." The contentions are made, however, (a) that the information shows on its face that the alleged misbehavior was committed more than three years before the information was filed and (b) that the three-year statute of limitations (Title 18, Sec. 582) applies to a contempt proceeding of the character here involved. These contentions must be examined.

(a) The information charges that the defendants by their acts of misbehavior procured this court's decree and so obstructed the administration of justice in this court. The information further charges that, to maintain that decree, well within three years before the information was filed, defendants committed certain other *affirmative* acts of concealment. (McCormack, for example, committed perjury to prevent discovery of the truth by this court).

Counsel point to what they think is an analogy. They say, in effect, if *A* robs a bank, the statute of limitations begins to run from the day the robbery is perpetrated. The fact that he conceals (by not revealing) the robbery does not toll the statute. And that undoubtedly is true, *if the crime was completed when the bank was robbed.*

A's crime consists not only of entering a bank with felonious intent, not only of stealing the moneys of the bank, but also of getting away with the loot. (Would anyone suggest that if a three year period—assuming a three-year statute

of limitations—began to run at the moment *A* fled from the bank and before he had disposed of the loot, and if he was not indicted until more than three years after he fled from the bank, the statute would protect him? Certainly not. At least it would not begin to run until the flight was ended and the loot concealed. But suppose the robber hides the loot in a cave and then maintains a guard outside the cave. That is *active* concealment, a continuance (not by any mere failure to reveal the crime) of the crime. The statute will begin to run *when the guard is taken down!*)

In this matter, if there is any applicable statute of limitations, it began to run *only when affirmative acts of concealment finally were discontinued.*

(b) We have seen that the misbehavior alleged was not completed until well within a period of three years before the filing of the information. But suppose that was not the fact, *what authority is there for saying that the three-year statute applies to a contempt proceeding for misbehavior in the presence of the court?*

The language of the three-year statute provides that—

"No person shall be prosecuted, tried or punished for any offense, not capital, except as provided in Section 584 of this title, unless the indictment is found, or the information is instituted, within three years next after such offense shall have been committed; * * *."

While a most forceful argument can be made that this statute does not apply at all to *any sort of a contempt proceeding* (but only to those criminal prosecutions which are instituted by criminal indictments and criminal informations), that argument must be disregarded since the decision of the Supreme Court in *Gompers* v. *United States*, 233 U. S. 605. It was held in that case that the three-year statute does apply *to a contempt proceeding for a violation of an injunction.* The Supreme Court said, however, (l.c. 606) that in the court in which the contempt proceeding had taken place—

"The inquiry was directed solely with a view to punishment for past acts, not to secure obedience for the future; and to avoid repetition *it will be understood that all we have to say concerns a proceeding of this sort only, and*

further, only proceedings for such contempt not committed in the presence of the court."

Thus, in the most careful manner possible, so there never could be any mistake about it, the Supreme Court said in the *Gompers* case that the ruling in that case had no application to a proceeding for contempt committed *in the presence of the court.* The intimation is most clear that such a contempt is in an entirely different category from contempt for violation of an injunction.

Although the Supreme Court thus expressly ruled that the *Gompers* case is no authority in a case of the character now before this court, we must, of course, consider whether the reasoning of the case is applicable here.

The gist of the reasoning in the *Gompers* case is that "contempts *of the class under consideration*" (l.c. 610) (i. e., violations of injunctions) are crimes because they "are infractions of the law, visited with punishment as such" and so possess "the most fundamental characteristics of crimes as that word has been understood in English speech." (l.c. 610) The thought is emphasized by pointing out (l.c. 612) that "The English courts * * * leave the punishment of *this class of contempts* to the regular and formal criminal process."

It is clear from the language of the Supreme Court, despite the brevity of this characteristic Holmes opinion, that the reason why violation of an injunction is an offense within the meaning of the three-year statute is that it is "an infraction of law" (an injunction is a law) which may be "visited with punishment as such." Hence the distinction so clearly indicated from misbehavior in "the presence of the court." If one says to the presiding judge in open court—"Thou fool," he violates no law, but he is guilty of contempt, he has committed no "offense" against the United States, but he may summarily be punished. Contempt of that character is not "a crime" in any true sense.

The *Gompers* case, when read carefully, really is authority for the proposition that the three-year statute *does not apply to such a contempt as is charged here.* Two other cases are cited (*U. S.* v. *Goldman*, 277 U. S. 229, and *Hart* v. *Oil Co.*, 27 F. Supp. 713). The *Goldman* case, also dealing with the violation of an injunction, does no more

than follow the *Gompers* case, with the same limitations. The court points out—"The only substantial difference between *such* a proceeding for criminal contempt and a criminal prosecution is that in the one the act complained of is *the violation of a decree* and in the other *the violation of a law*" (l.c. 235). And a decree is law. Punishment for the violation of a decree is essentially the same as punishment for the violation of a law (i.e., a statute). The basis for the conclusion reached is exactly the same as in the *Gompers* case. The opinions in both cases particularly point out that the proceeding before the court was contempt for violation of an injunction (which is the same as a law). *The inference is that vindication of the authority and dignity of the court as against a contempt committed in its presence is an entirely different matter.*

The *Hart* case, decided by the district court for the Eastern District of Texas, dealt with a matter which the court held was not contempt at all. It was not even suggested that and could not have been suggested that the matter (theft from a receiver appointed by the court) was contempt committed *in the presence of the court.* What, therefore, was said by the district judge in the line of extending the doctrine of the *Gompers* case to all kinds of contempt (a thing the Supreme Court specifically said it would not do) is unadulterated and erroneous *dictum.*

The power to punish, as contempt, misbehavior committed in the presence of the court is an inherent power. Congress has not limited the time within which it may be punished. Perhaps there is an inherent limitation in the inherent power, a limitation arising out of laches—*the punishment must not be unreasonably delayed.* Certainly it is not unreasonably delayed if a proceeding for punishment is begun as soon as the misbehavior is discovered, particularly if the misbehavants, by concealment and fraud, have prevented discovery.

Conclusion.

4. Our conclusion is that there is no real merit in any of the contentions made in support of the Motions and that the Motions should be overruled.

EXHIBIT B.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI—CENTRAL DIVISION.

No. 5040[3].

A Proceeding in Contempt Incidental to Equity Cases Nos. 270 to 426, Inclusive.

UNITED STATES OF AMERICA, *Plaintiff*,

vs.

THOMAS J. PENDERGAST, ROBERT EMMETT O'MALLEY and A. L. McCORMACK, *Defendants*.

Before Kimbrough Stone, Circuit Judge, Albert L. Reeves and Merrill E. Otis, District Judges.

The opinion of the Court was delivered by Otis, District Judge.

This case concerns contempt charged to have been committed against this three-judge court by Thomas J. Pendergast, Robert Emmett O'Malley and A. L. McCormack. The case of *Nye and Mayers, Petitioners*, v. *The United States of America and Guthrie*, — U. S. —, was decided by the Supreme Court April 14, 1941, after the trial of this case had begun. The reliance of learned counsel for defendants here is chiefly on the decision in that case. This court, of course, accepts in its full extent what was decided by the

[3] It should be noted that while this proceeding in contempt was given by the clerk a separate number, No. 5040, it always was a proceeding purely incidental, and was so regarded by the court and all the parties, to the insurance litigation referred to in the findings of fact herein and in this opinion. It should be noted also that while the cases involved in the insurance litigation were filed in the Central Division of the Western District, all of the proceedings, by the consent of all the parties thereto, and all of the proceedings in connection with the trial of the proceeding in contempt, with the consent of all the parties, were had in Kansas City, in the Western Division of the Western District, where the judges were more easily assembled.

Supreme Court. But if ingenious counsel have misinterpreted that decision, out of an understandable inclination to save their clients from punishment for what was the grossest misbehavior against the administration of justice in a federal court of which there is any record known to us, this court is not bound by their misinterpretation. We think the Supreme Court will spurn it as unthinkable. We think the Supreme Court will make it clear to all that, while—as was ruled in the *Nye and Mayers* case—it is not punishable contempt for an individual, at a point one hundred miles away from the seat of justice, to persuade a litigant to sign and mail a letter to a judge directing the dismissal of his case, it is punishable contempt for an agent of fire insurance companies and a political "Boss" (whose influence was bought by the payment to him of $440,000) and a bribed state official (to whom $62,600 was paid in bribery) and a fourth individual, the go-between of the principal conspirators, *in open court, in the presence and face of the court, grossly to deceive and hoodwink the judges constituting the court, and by that deception fraudulently to obtain decrees (inter alia) disposing of an impounded fund of $10,000,000, so prostituting the court to their venal purposes and exposing its judges to the possibility of disgrace and to certain humiliation.* What is presented in this case is as distinguishable from the facts in the *Nye and Mayers* case as night is from day.

Findings of Fact.

We state at once the essential facts (they are stated here as formal findings of fact):[4]

1. On May 28, 1930, one hundred and thirty-nine insurance companies filed one hundred and thirty-seven separate injunction suits against the Superintendent of Insurance and the Attorney General of Missouri to protect proposed increase of premium rates for fire, windstorm and hail in-

[4] The full history of the fraud which was perpetrated on the court and of its effect upon the insurance litigation is set out in the opinion of this court filed August 14, 1940, and in the supplemental opinion filed April 12, 1941. Those opinions have been published and may be read in — F. Supp. —.

surance filed by the companies with the superintendent. Thereupon this three-judge court was constituted. Temporary injunctions thereafter were entered upon conditions, one of which was that the companies might collect the increased rates *pendente lite* but must deposit the amount of the increase so collected with a custodian of the court to await the ultimate outcome of the suits. Deposits were made aggregating $10,000,000.

2. One Charles R. Street, now deceased, was the agent of the companies. Thomas J. Pendergast was a political "Boss" with almost dictatorial power residing in Kansas City. R. Emmett O'Malley, a creature of Pendergast, was Superintendent of Insurance and a party-defendant in the suits. A. L. McCormack was an insurance agent residing in St. Louis.

3. Before final determination of any of the suits Street, Pendergast, O'Malley and McCormack conspired and agreed together that the insurance companies (acting through Street) and O'Malley would enter into a pretended or fake settlement of the suits, whereby the interest of policyholders would be sacrificed and 80% of the impounded fund would be paid to the companies. It was a part of the conspiracy—and it was effected by Street, Pendergast, O'Malley and McCormack—that Street, as agent of the companies, would pay Pendergast for his influence with and control over O'Malley the total sum of $750,000 ($440,000 actually was paid to Pendergast), with a portion of which O'Malley should be bribed to betray the policyholders ($62,500 was paid O'Malley) and with another portion of which McCormack was to be compensated for his services as messenger between Street, Pendergast and O'Malley (McCormack was paid $62,500). It was a part of the conspiracy—and it was effected by Street, Pendergast, O'Malley and McCormack—that when the fake settlement of the suits finally was agreed on by Superintendent O'Malley and Street, (the fake settlement was reached in the Muehlebach Hotel in Kansas City, about six blocks from the United States Court House where the suits were pending) the attorneys for the Superintendent and the companies (the attorneys being ignorant of the corruption and fraud) would

present to the court, in open court, as a basis for motions for decrees, the fake settlement, as a genuine, good-faith settlement by antagonistic litigants. The fake settlement was presented to the court June 22, 1935, by Street, Pendergast, O'Malley and McCormack through and by their messengers. The court, the members of which were grossly deceived by the lying, false and fraudulent representation made in open court at the instance of Pendergast, O'Malley, Street and McCormack, entered the decrees February 1, 1936. The deception practiced on the court was vicious misbehavior, committed and consummated in the presence of the court and in open court. It was intended and calculated to mislead and deceive the court and to obtan fraudulent judgments and decrees. The deception was a continuing deception, was intended to exert its deceiving, pernicious and poisonous influence indefinitely, and until and unless discovered by the court. The deception was fortified and renewed by affirmative supplemental acts of deception committed as late as March, 1939.

4. When the court discovered (early in 1939)—through investigations of government agents into suspected income tax evasions and consequent grand jury inquisitions (the matter also was formally called to the court's attention by motions filed May 29, 1939)—that it had been victimized and its decrees obtained by gross imposture and fraud perpetrated upon it in open court and in the presence of the court, it requested the United States Attorney to file an information in contempt. The information in this case, filed at last on July 13, 1940, resulted.

The Nye and Mayers Case

1. There never has been the slightest word of denial by the testimony of any person or even by the assertion of counsel in argument that the defendants were not guilty of the misbehavior revealed in the findings of fact. Except for McCormack, who confessed, the defendants did not take the stand. *They stood on their technicalities.* Two of the defendants, Pendergast and O'Malley, entered pleas of guilty in this district court (Pendergast on May 22, 1939, O'Malley on May 27, 1939), before one of its judges, to

attempts to evade the payment of income taxes on receipts of the very money the insurance companies paid them for their services in deceiving and misleading the court and they had been sentenced to and had served sentences in the penitentiary for attempted evasion of taxes.[5] *That they got the money is a fact that stands out like Pike's Peak!* They were paid $440,000. For what?

The misbehavior is confessed or had as well be confessed. As long as *Toledo Newspaper Co.* v. *United States*, 247 U. S. 402, declared the law—as it did declare the law until April 14, 1941—misbehavior of the character of this obviously was punishable contempt. But counsel seem to argue that the *Nye and Mayers* case lays down an astounding doctrine—*misbehavior, to be punishable contempt, even if committed in the presence of the court, must be of that character of misbehavior which disturbs the peace of the courtroom.*

The Supreme Court espouses in the opinion of April 14, 1941, no such emasculating and destructive doctrine as counsel in this case would thrust upon it. Quite the contrary. The case dealt only with the proper interpretation of the phrase "so near thereto" in the statute (Judicial Code, Sec. 268; 28 U. S. C. A., Sec. 385) providing that "the power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence or so near thereto as to obstruct the administration of justice, * * *" It did not involve the companion phrase—misbehavior "in the presence of" the court. The court expressly cited with approval, as illustrating misbehavior "in the presence of the court," punishable as contempt, *Savin, Petitioner*, 131 U. S. 267 and *Cooke* v. *United States*, 267 U. S. 517. The misbehavior in the *Savin* case was an attempt to intimidate a witness in the

[5] The whole history of the criminal cases which resulted in the imposition of sentences on Pendergast and O'Malley for attempted evasions of income taxes, including much which throws light upon the background of the present proceedings in contempt, is set out in *United States* v. *Pendergast and O'Malley*, 28 F. Supp. 601. It is there made emphatically clear that Pendergast and O'Malley were sentenced only for the offenses charged against them and to which only they entered pleas of guilty, namely, attempted income tax evasions.

jury room, used as a witness room, and an attempt to intimidate a witness in the hallway of the courthouse while court was in session *in the courtroom.* The judge and other officials knew nothing of the misbehavior until it was revealed at a time subsequent to its occurrence. Here, of course, was no disturbance of the peace, no uproar in the courtroom, no interference with order and decorum within any narrow meaning of those words. But the Supreme Court said unanimously it was punishable contempt committed "in the presence of the court." In the *Cooke* case the misbehavior was sending a letter to the judge. The letter was written by Cooke blocks away from the courthouse and was delivered by a messenger to the judge in chambers, court being then in a short recess, and, therefore, "in the presence of the court" (l.c. 535), and contempt for that it was "calculated to stir the judge's resentment and anger" (l.c. 534). Unanimously the Supreme Court said "the letter was contemptuous" (l.c. 534). Mr. Justice Holmes, whose dissent in the *Toledo* case is pointed to and relied on in the *Nye and Mayers* case, concurred in the opinion in the *Cooke* case.

"In the Presence of the Court"

It is perfectly clear then that the Supreme Court did not intend to say and did not say in the *Nye and Mayers* case that only misbehavior which disturbs the peace of the courtroom is punishable contempt. "I do not understand my brethren to maintain that the secret bribery or intimidation of a witness in the courtroom may not be summarily punished" [i.e. punished as contempt], said Mr. Justice Stone in his dissenting opinion in the *Nye and Mayers* case, the Chief Justice and Mr. Justice Roberts concurring. Of course, the dissenting justices said that, in view of the approval by the majority of the *Savin* and *Cooke* cases.

What then is now the law of contempt as to misbehavior committed "in the presence of the court?" This much may be said with certainty—*Any such misbehavior is punishable contempt, if it interferes with or tends to interfere with the administration of justice in some pending case.*

Did the *Nye and Mayers* case change the interpretation

of—"in the presence of the court," as that phrase was interpreted in the *Savin* case and in the *Cooke* case, approved by the *Nye and Mayers* case? There can be no pretence that it did so. What is done in the witness room or in the corridors or in the chambers of the judge adjacent to the courtroom, while court is in session or during some short recess of court, is "in the presence of the court," whether what is done is or is not known to the presiding judge. The secret and whispered communication with the witness in the *Savin* case was misbehavoir committed "in the presence of the court," although the judge knew nothing about it until a later time. The sending by messenger of a letter which is delivered to the judge in chambers during a recess, as in the *Cooke* case, is misbehavior "in the presence of the court" and punishable contempt. The *Nye and Mayers* case does not question these long established declarations of law. The dissenting justices expressly said the majority of the court did not question them. Any careful study of the opinion supports the view that the majority does not question the meaning of "in the presence of the court" repeatedly declared in earlier decisions.

It is true that a superficial reading of the opinion in the *Nye and Mayers* case develops a little verbal support for the argument of counsel. The alleged contemnor in that case had persuaded a litigant, one Elmore, to sign a letter addressed to the judge. It was mailed. It was received by the judge. *Where* it was received, whether at the post office or in chambers or at his home or at some other town than that in which court was being held, or, if in chambers, whether during a recess while court was in session (facts *treated as essential in the Cooke case*), none of these facts is stated either in the opinion of the Supreme Court or in the opinion of the Court of Appeals.[6] In *short, nothing in the case remotely suggests that any act of alleged*

[6] We have also examined the record in the *Nye and Mayers* case which the clerk of the Supreme Court was kind enough to send us. Not only does that record not disclose that the letter to the judge was delivered to him in chambers while court was in session, but it is a very reasonable inference from the facts disclosed that it was *not* delivered to him in chambers while court was in session.

contemnors either was committed or consummated "in the presence of the court." The court said—"So far as the crime of contempt is concerned, the fact that the judge received Elmore's letter is inconsequential." How superficial to conclude that the Supreme Court meant to say that if an alleged contemnor's contemptuous letter, signed and mailed by the contemnor, is delivered to the judge in chambers, while court is in session, that would not be punishable contempt! The Supreme Court said nothing of the kind and could not have said anything of the kind after just having approved what was said in the *Cooke* case. It cannot be argued that the Supreme Court meant to say that if Nye himself had written a letter of such a character as that to write it constitutes misbehavior, and himself had signed and mailed that letter to the judge of the court in which a case was pending, *and if the letter so signed and mailed had been delivered to the judge in chambers and received by him while court was in session,* that then there would not have been contempt committed "in the presence of the court."

The misbehavior of the defendants in this case was committed in the very presence of the court and in open court. These defendants sent their messengers (their innocent and unsuspecting messengers) to the very courtroom and into open court) just as Cooke sent his messenger with his letter to the chambers of the court while court was in session). The misbehavior of these defendants was committed where it took effect and where it was intended to take effect. Except for what was contemplated should be done in open court, the misbehavior was without meaning or significance and would have been entirely futile. As was so well said by the Circuit Court of Appeals for the Ninth Circuit in *Independent Publishing Co.* v. *United States,* 240 F. 849,856—"the misbehavior is committed where it takes effect." In its opinion the Court of Appeals quoted the observation of the Supreme Court of Georgia in *Simpson* v. *State,* 92 Ga. 41, 17 S. E. 984, 22 L. R. A. 248:—"The well established theory of the law is that, where one puts in force an agency for the commission of crime, he, in legal contemplation, accompanies the same to the point where it becomes effectual * * *. So, if a man in the state of

South Carolina criminally fires a ball into the state of Georgia, the law regards him as accompanying the ball, and as being represented by it up to the point where it strikes."

The Test of Probable Effect.

A repeatedly approved method of construing the meaning of an instrument, a statute, or a judicial opinion is to examine the possible and probable effects thereof. If the *Nye and Mayers* case means what counsel for defendants contend, then the only way to punish any of these parties for the outrageous imposition upon this court is by indictment and ensuing criminal prosecution. This is so because they contend that all contempts, other than breaches of decorum during court sessions, are included in that decision.

Breaches of decorum in a courtroom are, nearly always, trivial matters which can be easily controlled and can have little influence upon public respect for courts and even less upon the reaching of just results in courts. They affect only the order in the courtroom. The contemptuous acts which break down public confidence in courts are those which improperly influence the fairness of trials and the justice of trial results. We cannot believe that the Supreme Court intended to hold that Congress has left to the courts power to protect themselves against trivial disturbances and has taken from them all power to protect themselves against acts which strike at the very heart of the administration of justice by the courts.

What might be the effect upon respect for the courts and the administration of justice in them if this contention be sound? We do not have to go beyond matters connected with this litigation for the answer. First, there must be an indictment procured. Next there must be a criminal prosecution carried through to conviction. Most of this procedure is entirely beyond any control of the court which may have been grossly victimized by being innocently used as an instrument to effectuate injustice. What can happen? What *has* happened here?

As set forth hereinafter in more detail (under the heading "No Double Jeopardy"), Pendergast and O'Malley were indicted for failure to return, for income tax pur-

poses, the very bribe money involved here. To procure pleas of guilty therein, the United States Attorney, as it now appears, agreed not to prosecute either of them for any other offenses connected with such transactions. One of the judges of this court caused to be presented to a subsequent grand jury this bribery transaction with the result of an indictment for obstruction of the administration of justice. That obstruction of justice was the procurement of the decrees of February 1, 1936, in these rate litigations, by this bribery. After impanelment of a petit jury in those prosecutions, the United States Attorney entered in each case a *nolle prosequi*. This he did in performance of the above agreement. Had this present contempt proceeding been by indictments, can it be doubted that the same ending would have resulted therein?

Thus we have the picture following. By gross bribery of a public official (Superintendent of Insurance O'Malley), representing several millions of policyholders and involving about $10,000,000.00, a court is innocently induced to enter decrees disposing of such rights. The bribed are indicted for not returning the received bribe for income tax purposes. To procure pleas of guilty therein the United States Attorney agrees not to prosecute them for the bribery transactions. If this indubitable contempt of this court can be reached only by indictment, it would not be prosecuted. In short, those who perpetrated a gross fraud against the administration of justice go scot free and the court which has been victimized is powerless.

What respect can the public have for a system which permits such results? Yet just such results would occur here and would be unpreventable by this court, if defendants have construed the *Nye and Mayers* case correctly. Surely, the Supreme Court did not mean to declare, in the Nye and Mayers case, that Congress intended to create such a possible situation by its enactment of Section 268 of the Judicial Code (28 U. S. C. A., Sec. 385).

Minor Points Considered.

2. In addition to their argument that the Supreme Court by its decision in the *Nye and Mayers* decision has made

the federal trial courts impotent to deal with the grossest sort of misbehavior, even if committed "in the presence of the court," unless it is a specific kind of misbehavior, namely, a disturbance of the courtroom peace, counsel advanced four other arguments. Counsel said they were not abandoning still other points, but these points they pressed: (1) A three-judge court has no jurisdiction under any circumstances to punish for contempt incident to a case pending before it; (2) The guilt of defendants was not proved beyond a reasonable doubt; (3) Defendants are saved by the statute of limitations; (4) Theoretically the defendants have been placed in double jeopardy by this proceeding. Concerning certain of these arguments already we have expressed our views. *United States* v. *Pendergast, et al.*, 35 F. Supp. 593. We wish now only to supplement what we said in the opinion cited.

We shall not further discuss in this opinion the contention that a three-judge court cannot deal with contempt incident to a case pending before it. If a three-judge court is the only eunuch among courts, if it alone cannot maintain its dignity and its authority, let the declaration of its weakness and incompetence be made elsewhere than here.

3. We shall not discuss at length the asserted failure to prove guilt beyond reasonable doubt. If the facts we have found do not prove guilt, guilt never can be proved in any case.

Even zealous counsel (and counsel for defendants are zealous, able and honorable) never, at any time, have asserted—we think they never will assert—that our finding that defendants were paid by the agent of the insurance companies $440,000 in connection with decrees to be secured in the insurance litigation in this court is not the truth. *That the defendants got the money is a fact that stands out like Pike's Peak. They* were paid $440,000. For what?

When counsel speak of facts not proved beyond a reasonable doubt evidently they refer to deductions the court has drawn from facts proved. Street gave McCormack, at different times, $440,000. McCormack carried the money which Street had given him to Pendergast. Pendergast gave O'Malley, out of the money received from Street through

McCormack, $62,500, and gave McCormack $62,500. The whole transaction was for the express purpose of effecting a settlement of the insurance litigation which would give the companies 80% of the impounded fund. The court has deduced from these and other proved facts that there was a conspiracy between Street, Pendergast, O'Malley and McCormack to obtain decrees disposing of the impounded fund in accordance with the scheme of the conspirators. The court has deduced from the proved facts that Street, Pendergast, O'Malley and McCormack intended to and did execute the scheme, in the only way it could be executed, by procuring, in open court, in the presence of the court, through attorneys, ignorant of the background of the scheme and its corrupt and fraudulent character, the decrees which were the whole object of the scheme. But these deductions are as completely and fully proved by the facts as the deduction that when *X* points a gun toward *Y* and fires and *Y* falls with a bullet hole in his forehead, *Y* has been shot by *X*, although no one testifies that he has seen the bullet on its way from the muzzle of the gun to the forehead of the murdered man. Judges too may draw necessary and obvious inferences even as jurors may draw inferences.

Matter of Limitations.

4. In our opinion in 35 F. Supp. we discussed fully the statute-of-limitations argument still urged upon us. We incorporate here by reference that opinion and briefly supplement what was there said. The whole theory of counsel is that the misbehavior of defendants ended when they caused false representations to be made to the court on June 22, 1935. That theory is unsound. So far as the court is concerned, that date was when the misbehavior of defendants *commenced*. The essence of the misbehavior was the deception practised on the court. If the truth had been revealed the next day after the false representations were made, of what value would the deception have been to the conspirators? It was intended that the deception planted on June 22, 1935, should exert its effect continually thereafter. So long as the deception continued to deceive—and it did that until early in 1939—the misbehavior continued.

The misbehavior here was the *planting of a lie in the minds* of the judges and in the records of the court, a lie whose emanations—like the baleful emanations of radium—would continue and were intended to continue to deaden the sensibilities of the victims imposed on for an indefinite period. If a criminal plants a bomb in his victim's residence which will explode in a month, when does the statute of limitations begin to run,—when he plants the bomb, or when it does its devastating work? If a criminal plants in another's house some receptacle of noxious gas which slowly will exude its poison during months, when has his crime been completed, if six months afterward the gas exuding destroys a human life? Is not the crime completed then? The statute of limitations begins to run then.

Moreover, we have found the fact to be that defendants fortified and renewed their original and continuing deception by affirmative supplemental acts of deception committed as late as March, 1939. The particular acts of supplemental deception indicated by the evidence were (a) the solicitation by O'Malley of McCormack, that in McCormack's testimony to the grand jury he could not reveal O'Malley's connection with the matter of obtaining the fraudulent decrees and (b) McCormack's first testimony to the grand jury, in which he concealed by perjury his own as well as Pendergast's and O'Malley's connection with the deception of the court. We say that these were affirmative and supplemental acts of deception, fortifying and keeping alive the original continuing deception. The deception conceived by the conspirators in its very nature involved the necessity that each of the parties should prevent discovery of the truth by any and every active means, should discovery of the truth ever seem to be impending. That was proved when the scheme to deceive was proved. When, therefore, O'Malley, learning that McCormack had been called to testify before the grand jury, took affirmative steps to stop McCormack's mouth, and when McCormack, being actually called to testify before the grand jury, concealed by perjury his and Pendergast's and O'Malley's connection with the fraudulent decrees, both O'Malley and McCormack, by affirmative acts, were carrying out the plan of all. The contention now made by counsel that because McCormack

testified there was no express agreement to this effect means nothing. There was no formal agreement, of course. It is elementary that a formal agreement need not be proved, when what was done reasonably may be inferred as having been agreed upon by the parties.

There is another thought which in this connection should not be overlooked. In one theory, sometimes hinted at in the decisions, the very essence of misbehavior "in the presence of the court" which makes it contempt of court is the effect of the misbehavior upon the mental balance of the judges who must decide cases pending. So in the *Cooke* case the Supreme Court said that the misbehavior there was contempt for that it was "calculated to stir the judge's resentment and anger." Now the lie which was planted in the court by the defendants here could not produce its effect of stirring the resentment and anger of the court until it was discovered by the court that it was a lie. And that did not happen in this case until the spring of 1939.

While we think, therefore, that there is no statute of limitations applicable to contempt committed "in the presence of the court," we think also that if there is, it did not begin to run in this case until the deception practiced by the defendants ceased to have effect nor until the last affirmative act fortifying the deception was committed by the conspirators, or one of them, nor until the essence of the contempt became an active principle by the discovery of the truth.

No Double Jeopardy.

5. The double-jeopardy argument remains to be considered but it can be disposed of in a short paragraph. The basis of the argument is this. In addition to the information charging contempt of court, which initiated the present proceeding, the grand jury also returned an indictment against defendants charging an attempt to obstruct the administration of justice. The indictment was bottomed upon some, but not all, of the facts charged in the information in contempt. When the criminal case was ready for trial and a jury had been impanelled, the United States Attorney, then in Washington, wired the Assistant United States Attorney in charge of the prosecution to enter a

nolle prosequi. This action was taken after the jury had been impanelled. The case was dismissed when the entry of *nolle prosequi* was made.[7] There is not, however, the slightest suggestion that the dismissal was over the objection of the defendants, or any of them. It was not only

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[7] The legal question presented is not affected by the background of the dismissal of the criminal case upon the entry of *nolle prosequi*. For the sake of the record, however, we desire to present the essential parts of that background in this footnote. The telegram of the United States Attorney is in the record. In the telegram he gave the reason for his action in entering a *nolle prosequi* of the criminal case. The reason given was that he had entered into an agreement with counsel for Pendergast and O'Malley, before they entered pleas of guilty to attempting to evade income taxes, that he would not prosecute them for other offenses, if they entered pleas. He believed that he should abide by that agreement, even as to an indictment returned during the term of another United States Attorney, and actively secured by that other United States Attorney.

This Court never had heard of the existence of any such agreement until the telegram dismissing the criminal case was made public. None of the judges of this court ever had heard from the United States Attorney of the existence of any such agreement until the telegram was made public. We do not state these facts in criticism of the United States Attorney. Indeed, on several occasions, the two district judges of this court have attested their high regard for him and for his public services and they now reassert that high regard. His public services have been outstanding and deservedly have won for him the respect of the nation. We think he had the undoubted right to make the agreement—unless it included the bargaining away of this court's power to punish for contempt (and there has been no contention that the United States Attorney attempted that). In fairness to the United States Attorney, we desire to make it very clear that he never has said, so far as we are aware, that the agreement disclosed by his telegram was known to this court or to any of the judges of this court.

When Pendergast entered a plea to the charge of attempting to evade taxes, the United States Attorney stated in open court that he did not intend to prosecute him for certain other offenses he might have committed and he intimated that the court might take into consideration, in assessing punishment, other offenses. He said nothing about an agreement. *Attorneys for Pendergast said nothing about an agreement and admitted none. There was on their part no confession or admission of any offense except that which was charged in the indictment. For that alone, said they, the defendant should be sentenced.* There was not the slightest intimation by anyone that the plea of guilty was entered upon a condition that Pendergast would not be prosecuted for some other and graver crime. The court, in imposing sentence, immediately made it emphatically clear that Pendergast, pleading guilty to and confessing only the crime charged, could be sentenced only for the crime charged and confessed. When a week later,

not over their objection, but clearly it was sought most earnestly by the defendants, who had done everything conceivably possible to be done to avoid trial. The law is that when a case has been dismissed by *nolle prosequi*, the defendants not objecting to the dismissal, the defendants have

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O'Malley was sentenced for attempting to evade taxes, once more it was made emphatically clear from the bench that he was sentenced only for the offense charged and confessed. Both he and Pendergast, said the court, might thereafter be charged with other offenses, in which event they would be entitled to due process of law. There was still no intimation of an agreement inconsistent with the court's declaration. See 28 F. Supp. 601.

The United States Attorney did not mention any agreement when he was requested by this three-judge court to institute contempt proceedings and to secure an indictment from the grand jury against any who had been guilty of obstruction of justice. On the contrary, he said he would undertake to comply with the request of the court. A year afterward, the Acting United States Attorney, who had been an Assistant United States Attorney at the time of the agreement, when he was requested by the court to institute a contempt proceeding and to secure an indictment, if possible, did not say (we are sure he did not know) that there was any agreement that would constitute an obstacle to the prosecution of an indictment, if secured, or an information, if filed. Once more, after an interval, again Assistant United States Attorney, the same fine lawyer, has conducted this prosecution with courage and ability, never suggesting any agreement as an obstacle. When the indictment was returned and when the information was filed, and when the United States Attorney who had made the agreement had been reappointed United States Attorney, he did not intimate that there was any agreement which would prevent the prosecution of the indictment and of the information in contempt. He could have dismissed the indictment at any time. But the indictment was not dismissed until after a judge had been brought to Kansas City from South Dakota to try the case and until after a jury had been impanelled at great expense for the trial. A reasonable inference is that he made known the agreement then, at the instance and request of counsel for defendants, who themselves had kept in strictest secrecy the existence of an agreement *until after Pendergast and O'Malley had been sentenced and the term had passed and sentences could not be changed.* Counsel not only did not object to the *nolle prosequi* but were happy to escape trial by jury. If it was a part of their strategy that thereafter they would seek to avoid punishment for contempt by asserting defendants had been put in jeopardy under the indictment, we are certain the United States Attorney was not taken into their confidence.

All that the United States Attorney did was altogether legitimate and actuated by good and honorable motives. We advert to the matter only that the record may clearly show that neither this court nor any of its members ever had knowledge of any agreement with the defendants or their counsel that conceivably might be urged as preventing prosecution for contempt of court.

not been put in jeopardy. *Craig* v. *United States* (9 C. C. A.), 81 F. (2d) 816. Certiorari Denied, 298 U. S. 690—Rehearing Denied, 299 U. S. 620; Compare *United States* v. *Shoemaker*, 27 Fed. Cas. 1067, 106.

Conclusion.

Upon the facts found to have been proved beyond a reasonable doubt and herein stated in our Findings of Fact *we declare the defendants and each of them guilty of contempt of this court as charged in the information.* The formal judgment will be embodied in a separate document. Also there will be embodied in a separate document the rulings of the court on objections to matters of evidence in all instances where rulings were withheld at the trial. The time for imposing sentences will be announced hereafter and due notice thereof will be given to all concerned.

In the District Court of the United States for the Western District of Missouri, Central Division

No. 5040

A proceeding in contempt incidental to Equity Cases Nos. 270 to 426, inclusive

UNITED STATES OF AMERICA, PLAINTIFF

v.

THOMAS J. PENDERGAST, ROBERT EMMETT O'MALLEY, AND A. L. MCCORMACK, DEFENDANTS

ORDER APPOINTING COUNSEL

This contempt proceeding, as a proceeding incidental to the insurance litigation (Equity Cases Nos. 270 to 426, inclusive), is, in no strict sense, an ordinary criminal case brought by the government against individuals. The office of United States Attorney, as such, is under no duty to carry on a proceeding of this character. This court requested Mr. Richard K. Phelps, then Acting United States Attorney, as *amicus curiae,* to prepare and prosecute the information in contempt. These things he has done with fine ability and the court desires publicly and on the

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record to express its appreciation of his services.

It now has been indicated that an appeal will be taken from the judgment of the court. The work incident to that appeal will be great. The court does not feel that the whole burden should be imposed on one man nor that the attorneys who represent the appellee, if an appeal is taken, should be uncompensated for their services. The court thinks they should be reasonably compensated and that it is right and proper that their compensation should be taxed as costs in the insurance litigation to which this proceeding is incidental.

It is therefore ordered that Mr. Richard K. Phelps and Mr. William S. Hogsett be, and they are hereby appointed as special counsel and as *amici curiae* to represent the appellee in any appeal taken from the judgment of this court in this proceeding.

KIMBROUGH STONE,
Circuit Judge.

ALBERT L. REEVES,
District Judge.

MERRILL E. OTIS,
District Judge.

Filed in the United States District Court June 7, 1941.

In the District Court of the United States for the Western District of Missouri, Central Division

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No. 5040

A proceeding in contempt incidental to Equity Cases Nos. 270 to 426, inclusive

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UNITED STATES OF AMERICA, PLAINTIFF (APPELLEE)

v.

THOMAS J. PENDERGAST, ROBERT EMMETT O'MALLEY, AND A. L. MCCORMACK, DEFENDANTS (APPELLANTS)

APPELLEE'S JURISDICTIONAL STATEMENT AND MOTION TO DISMISS THE SEPARATE APPEALS OF THOMAS J. PENDERGAST AND ROBERT EMMETT O'MALLEY, TAKEN JULY 2, 1941

Now comes plaintiff (appellee) United States of America and respectfully states that the Supreme Court of the United States is without jurisdiction of the separate appeals to that court, taken on July 2, 1941, by defendants (appellants) Thomas J. Pendergast and Robert Emmett O'Malley, by the filing of their respective notices of appeal, and by the filing of their respective petitions for appeal accompanied by their respec-

tive assignments of error; and said appellee moves that the separate appeals so taken by said defendants to the Supreme Court of the United States, and each of said appeals, be dismissed, for the following reasons:[1]

First. The nature and essential facts of the case are clearly stated in the opinions below, copies of which are attached to the jurisdictional statements of defendants (appellants) Pendergast and O'Malley. The opinion on motions to abate and quash the information in contempt is reported at 35 F. Supp. 593, and the opinion filed after the hearing is reported at 39 F Supp. 189.

Second. The three-judge district court was properly convened to hear and determine the insurance rate cases, and had jurisdiction to hear and determine the same and all issues therein, under the provisions of Sec. 266 of the Judicial Code as amended, Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938, 28 U. S. Code, Sec. 380, because: The plaintiff insurance companies in said cases each prayed for an interlocutory injunction, and for a permanent injunction, suspending and restraining the enforcement, operation and execution of statutes of Missouri, by restraining the action of the Superintendent of the Insurance Department and of the Attorney General of said

[1] The jurisdictional statements filed by said appellants are identical; therefore appellee files one jurisdictional statement and motion to dismiss, applicable to the appeals of both appellants.

state, in the enforcement and execution of said statutes, and in the enforcement and execution of an order (dated May 28, 1930, disapproving the filing by said insurance companies of increased rates) made by said Superintendent of the Insurance Department acting under and pursuant to said statutes, upon the ground of the unconstitutionality of said statutes. (See bill in equity, and the amended bill and supplemental bill, in one of said cases, entitled *American Insurance Company* v. *Thompson et al.*, No. 270, which are substantially identical with like bills in the other cases. Said bills appear in the transcript.) The insurance companies pressed their applications for interlocutory injunction, and the same were presented to and granted by said three-judge court. The following decisions by the Supreme Court sustain the jurisdiction of said three-judge court in the insurance rate cases:

National Fire Ins. Co. v. *Thompson, Supt. of the Insurance Dept. of the State of Missouri,* 281 U. S. 331, 333.

Oklahoma Natural Gas Co. v. *Russell,* 261 U. S. 290, 292.

Herkness v. *Irion,* 278 U. S. 92, 93–4.

United Fuel Gas Co. v. *Public Service Commission,* 278 U. S. 322, 323.

Tyson & Brother v. *Banton, District Attorney,* 273 U. S. 418, 428.

Board of Public Utility Commissioners v. *New York Telephone Co.,* 271 U. S. 23, 26.

Lawrence v. *St. Louis-San Francisco Railway Co.*, 274 U. S. 588, 590.
Banton v. *Belt Line Railway Corp.*, 268 U. S. 413, 415.
Gilchrist v. *Interborough Rapid Transit Co.*, 279 U. S. 159, 189–190.
Williams v. *Standard Oil Co.*, 278 U. S. 235, 238–9.

The Superintendent of the Insurance Department of the State of Missouri is "an administrative board or commission" within the meaning of 28 U. S. Code Sec. 380.

Moore, Insurance Commissioner v. *Fidelity & Deposit Co.*, 272 U. S. 317, 320.
National Fire Insurance Co. v. *Thompson, Supt. of the Insurance Dept. of the State of Missouri*, 281 U. S. 331, 333.
Cline, District Attorney v. *Frink Dairy Co.*, 274 U. S. 445, 449, 451.
Tyson & Brother v. *Banton, District Attorney*, 273 U. S. 418, 428.
Banton v. *Belt Line Railway Corp.*, 268 U. S. 413, 415.

Third. The three-judge court, having jurisdiction of the insurance rate cases, had inherent power to punish for contempt arising out of and incidental to those cases.

Michaelson et al v. *United States*, 266 U. S. 42, 65–66.
Myers et al. v. *United States*, 264 U. S. 95, 103.
United States v. *Hudson and Goodman*, 11 U. S. 32, 7 Cranch 32, 34.

The contempt consisted of carrying out a conspiracy between one Charles R. Street (agent for the plaintiff insurance companies, now deceased), defendant McCormack (who acted as go-between), defendant Pendergast (a political boss) and defendant O'Malley (defendant Superintendent of the Insurance Department) by corrupt means, including bribery of O'Malley, to obtain a decree of the three-judge court approving a so-called settlement of the insurance rate cases, and authorizing distribution of about $10,000,000 in impounded premiums. The so-called settlement provided that 20 percent, or approximately $2,000,000, would go to the policyholders and 80 percent, or approximately $8,000,000, would go to the insurance companies. According to the secret agreement of the conspirators, Pendergast's "fee," contingent on bringing this "settlement" about, was to be $500,000—later increased to $750,000; and of this sum he was paid $440,000 by the insurance companies, out of which he paid the $62,500 bribe to Superintendent O'Malley, and $62,500 to the intermediary McCormack. A decree authorizing distribution of the impounded premiums was obtained from the three-judge court, by the filing in open court of a stipulation of the parties and motion for decree alleging the "settlement," and upon assurances by the parties (through counsel) in open court that the "settlement" had been made in good faith as the result of negotiations at arm's length, and was for the best interest of the

policyholders. The bribery and corruption were of course concealed from the court. The decree was thus corruptly obtained by acts and representations in open court. In accordance with the decree the court's custodian, from time to time during the ensuing three years, continued distribution of the impounded premiums. In the spring of 1939 the bribery and corruption came to light, through investigation activities by the Income Tax Division of the Treasury Department of the United States. The three-judge court learned of it, and this contempt proceeding followed. (The subsequent history of the insurance rate litigation appears in *American Insurance Co.* v. *Lucas,* 38 F. Supp. 896, and see opinion on insurance companies' motion for new trial at 926.) During the three-year interval, while the conspiracy was unknown, and as late as March, 1939, two of the conspirators, in accordance with the agreement of all, perpetrated affirmative acts of concealment to keep the bribery and corruption hidden from the three-judge court. Under these facts, the defendants' contempt of court clearly grew out of and was incidental to the insurance rate cases, and the three-judge court, against which the contempt was committed, had exclusive jurisdiction to punish it.

In re Debs, 158 U. S. 564, 594–5.
Myers v. *United States,* 264 U. S. 95, 104.
Michaelson v. *United States,* 266 U. S. 42, 65–6.

Merchants' Stock & Grain Co. v. *Board of Trade* (8 C. C. A.), 201 Fed. 20, 27.
Sullivan v. *United States* (8 C. C. A.), 4 F. (2d) 100, 101.
Dunham v. *United States* (5 C. C. A.), 289 Fed. 376, 378.

Fourth. The appeals from the contempt judgment by Pendergast and O'Malley to the Supreme Court of the United States, by the filing of notices of appeal, on July 2, 1941, should be dismissed, because: If such direct appeals were permitted by law at all (which appellee denies, for reasons hereinafter stated), they could only be taken by petitions for appeal accompanied by assignments of error. (Supreme Court Rule 9; and compare Rule 72 of the Rules of Civil Procedure.) The purported appeals by notices filed July 2, 1941, do not comply or even purport to comply with any of the requirements of a notice of appeal in criminal cases. (Rule III of the Rules of Practice and Procedure in Criminal Cases Promulgated by the Supreme Court of the United States, May 7, 1934.)

Fifth. None of said appeals taken by said defendants Pendergast and O'Malley on July 2, 1941, whether by filing notices of appeal or by filing petitions for appeal accompanied by assignments of error, is authorized by any provision of Sec. 266 of the Judicial Code as amended, Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938, 28 U. S. Code Sec. 380, which is the statute upon

which said defendants, in their respective jurisdictional statements, rely to sustain the jurisdiction of the Supreme Court of the United States. The only direct appeal to the Supreme Court authorized by said section is (a) an appeal from an order of a three-judge court granting or denying an interlocutory injunction, or (b) an appeal from a final decree granting or denying a permanent injunction, in the type of case described in said section. The appeals which have been taken to the Supreme Court by defendants Pendergast and O'Malley are not appeals from an order granting or denying an interlocutory injunction; nor are they appeals from a final decree granting or denying a permanent injunction. Therefore said appeals do not fall within either category; and are not authorized by any provision of said section.

Sixth. Section 238 of the Judicial Code as amended, Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938, 28 U. S. Code Sec. 345, upon which said defendants in their respective jurisdictional statements also rely, does not authorize said appeals to the Supreme Court, because: Said appeals obviously are not authorized by any provision of 15 U. S. Code Sec. 29 (relating to suits under the Anti-Trust Laws), or by any provision of 49 U. S. Code Sec. 45 (relating to suits under the Interstate Commerce Act), or by any provision of 18 U. S. Code Sec. 682 (relating to direct appeals by the United States in certain criminal cases), or by any provision of 28 U. S. Code Secs.

47 or 47a (relating to injunctions affecting orders of the Interstate Commerce Commission), or by any provision of 7 U. S. Code Sec. 217 (relating to suits affecting orders of the Secretary of Agriculture); and, as shown in the preceding paragraph, said appeals are not authorized by any provision of 28 U. S. Code Sec. 380. Section 238 of the Judicial Code as amended, Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938, 28 U. S. Code 345, does not provide for a "direct review" by the Supreme Court of every appeal which may be taken in any case mentioned in the five different statutes or parts of statutes there listed; but, on the contrary, provides for such direct review by the Supreme Court only "where it is so provided" in the sections themselves. For example, a direct appeal to the Supreme Court may be had under 18 U. S. Code Sec. 682 only in the specific cases therein provided. (*United States* v. *Borden & Co.*, 308 U. S. 188, 193, and cases cited.)

Seventh. Defendants Pendergast and O'Malley have taken timely appeals from the judgments in question to the Eighth Circuit Court of Appeals, as shown by their respective jurisdictional statements. By the Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 936, as amended, 28 U. S. Code Sec. 225 (Section 128 of Judicial Code as amended), the Circuit Court of Appeals is given exclusive jurisdiction of all appeals from the District Court in all cases not falling within the provisions of Section 238 of the Judicial Code as

amended, Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938, 28 U. S. Code Sec. 345. Therefore the situation presented here is radically different from that presented in *Rorick* v. *Board of Commissioners of Everglades Drainage District,* 307 U. S. 208, 213; *Oklahoma Gas & Electric Co.* v. *Oklahoma Packing Co.,* 292 U. S. 386, 392; *Gully* v. *Interstate Natural Gas Co.,* 292 U. S. 16, 19; *Phillips* v. *United States,* 312 U. S. 246, 85 Law Ed. 460, 465; and *International Ladies' Garment Workers' Union* v. *Donnelly Garment Co.,* 304 U. S. 243, 252, cited in appellants' jurisdictional statements. In each of those cases the time for appeal to the Circuit Court of Appeals had expired. A dismissal by the Supreme Court of the appeals taken to that court by Pendergast and O'Malley will not deprive them of the right to have the judgment in question reviewed on appeal; and, to the contrary, they may have the judgment reviewed by the Eighth Circuit Court of Appeals, which has exclusive jurisdiction thereof. A timely appeal having been taken to that court, the judgment can be reviewed there, although it was rendered by three judges.

Phillips v. *United States,* 312 U. S. 246, 254, 85 Law Ed. 460, 465.
Healy v. *Ratta,* 289 U. S. 701.
Healy v. *Ratta,* 292 U. S. 263, 264.

Eighth. The Supreme Court of the United States has held that it does not have jurisdiction of a direct appeal from a judgment in contempt rendered by a District Court. (*Farmers' &*

Mechanics' National Bank v. *Wilkinson,* 266 U. S. 503, 506.)

Ninth. None of the cases cited in appellants' jurisdictional statements sustains jurisdiction in the Supreme Court of the United States of the appeals herein.

In *Rorick* v. *Board of Commissioners of Everglades Drainage District,* 307 U. S. 208, 213; *Oklahoma Gas & Electric Co.* v. *Oklahoma Packing Co.,* 292 U. S. 386, 392; *Gully* v. *Interstate Natural Gas Co.,* 292 U. S. 16, 19; and *Phillips* v. *United States,* 312 U. S. 246, 254, 85 Law Ed. 460, 465, the Supreme Court held it had no jurisdiction of the direct appeals there involved. But in each of those cases the time for appeal to the Circuit Court of Appeals had expired, and for that reason alone, and in order to save the appellants' right to review, the court vacated the decree below and remanded the cause for further proceedings independently of Section 266 of the Judicial Code (28 U. S. Code Sec. 380). In *International Ladies' Garment Workers' Union* v. *Donnelly Garment Co.,* 304 U. S. 243, 252, the decision was to the same effect, except there the jurisdictional statute involved was Section 3 of the Act of August 24, 1937. Obviously these cases are without influence here, because Pendergast and O'Malley have not lost their right of review, and have in fact appealed to the Eighth Circuit Court of Appeals.

In *Moore* v. *Fidelity & Deposit Co.*, 272 U. S. 317, 321, and *Smith* v. *Wilson*, 273 U. S. 388, 391, the Supreme Court dismissed direct appeals from the District Courts, because in each case the application for preliminary injunction was not pressed—and in the *Moore* case there was no request for a three-judge court. Clearly those cases are without influence here.

In *United States* v. *California Cooperative Canneries*, 279 U. S. 553, 560, and *Terminal Railroad Ass'n* v. *United States*, 266 U. S. 17, 32, the Supreme Court held that the direct appeals were authorized under the Expediting Act of February 11, 1903, c. 544, 32 Stat. 823. Plainly those cases are not in point.

In *Arkadelphia Milling Co.* v. *St. Louis & South Western Railway Co.*, 249 U. S. 134, 142, and *St. Louis, Iron Mountain & Southern Railway Co.* v. *Hasty*, 255 U. S. 252, 256, the Supreme Court held that direct appeals were authorized because the decrees appealed from were entered in cases which involved the construction and application of the Federal Constitution, within the meaning of Section 238 of the Judicial Code. Manifestly those cases are not in point.

In *Leman* v. *Krentler-Arnold Hinge Last Co.*, 284 U. S. 448, 457, no question of direct appeal was involved at all.

Tenth. In subdivision 7 of each jurisdictional statement filed by appellants Pendergast and O'Malley, appellant asserts that the three-judge

court erred in certain respects. These assertions of error go to the merits, and have no place in appellants' jurisdictional statements. Appellee therefore submits no response thereto in this jurisdictional statement, and reserves its response until such time as it may file its brief on the merits.

WHEREFORE plaintiff (appellee), United States of America, moves that the appeals taken to the Supreme Court of the United States on July 2, 1941, by defendants Thomas J. Pendergast and Robert Emmett O'Malley, respectively, by the filing of their respective notices of appeal, and by the filing of their respective petitions for appeal accompanied by assignments of error, be dismissed.

Respectfully submitted.

RICHARD K. PHELPS,
WILLIAM S. HOGSETT,
Counsel for Plaintiff (Appellee)
United States of America.

Received copies hereof this 11th day of July 1941.

JOHN G. MADDEN,
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JAMES P. AYLWARD,
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Filed in the United States District Court July 11, 1941.

[Supplement to appellee's motion to dismiss the appeals in *Pendergast* v. *United States*, No. 568, and *O'Malley* v. *United States*, No. 569]

The Solicitor General joins in this motion to dismiss the appeals, although he has not participated in its preparation, in the belief that by so doing he will facilitate presentation to the Court of the arguments of counsel appointed to prosecute the contempt proceedings by the three-judge court. The following paragraphs are presented on behalf of the United States Government:

1. The three-judge court was convened pursuant to section 266 of the Judicial Code (28 U. S. C., sec. 380) and that court properly assumed jurisdiction to punish a contempt against it. *Michaelson* v. *United States*, 266 U. S. 42, 65–66. Appellants base their chief claim of appellate jurisdiction in this Court upon section 266, as amended by the Act of February 13, 1925. But a direct appeal to this Court is authorized by that section only from an order granting or denying an interlocutory or final injunction. *Public Service Commission* v. *Brashear Lines*, 306 U. S. 204. This plainly is not such a case.

2. Appellants also place some reliance upon section 238 of the Judicial Code (28 U. S. C., sec. 345). This case falls within none of the categories there specified (certain suits under the Anti-Trust laws and the Interstate Commerce Act, certain pretrial decisions against the United

States in criminal cases, and proceedings to enjoin enforcement of the orders of the Interstate Commerce Commission and of the Secretary of Agriculture under the Packers and Stockyards Act).

3. Appellants have also filed timely appeals to the circuit court of appeals. That court would appear to have jurisdiction. Section 128 of the Judicial Code (28 U. S. C., sec. 225); *Healy* v. *Ratta*, 289 U. S. 701, 67 F. (2d) 554, 292 U. S. 263; *Phillips* v. *United States*, 312 U. S. 246, 254. There is, accordingly, no occasion to reinstate the case below in order to preserve appellants' right to appeal.

It is therefore respectfully submitted that these appeals should be dismissed.

CHARLES FAHY,
Charles Fahy,
Acting Solicitor General.

SEPTEMBER 1941.

U. S. GOVERNMENT PRINTING OFFICE: 1941

No. 568. PENDERGAST *v.* UNITED STATES; and

No. 569. O'MALLEY *v.* UNITED STATES. Appeals from the District Court of the United States for the Western District of Missouri. October 13, 1941. *Per Curiam:* It does not appear that the proceedings sought to be reviewed required the presence of three judges under § 266 of the Judicial Code as amended, 28 U. S. C. § 380. *Public Service Commission* v. *Brashear Lines,* 312 U. S. 621, 625–26; *Phillips* v. *United States,* 312 U. S. 246, 248–51. The motion to dismiss is therefore granted and the appeals are dismissed. The appeals filed under § 238 of the Judicial Code as amended, 28 U. S. C. § 345, are dismissed for want of jurisdiction. MR. JUSTICE MURPHY and MR. JUSTICE JACKSON took no part in this decision. *Messrs. R. R. Brewster* and *John G. Madden* for appellant in No. 568. *Messrs. James P. Aylward* and *Terence M. O'Brien* for appellant in No. 569. *Assistant Solicitor General Fahy* and *Mr. William S. Hogsett* for the United States. Reported below: 39 F. Supp. 189.